Re CHS

HIGH COURT (MELAKA) ORIGINATING MOTION NO 25–30 OF 1997
AUGUSTINE PAUL JC
13 JUNE 1997

Civil Procedure *— Mode of commencement — Non-compliance with procedure — Application commenced by wrong mode — Proceedings should have been by way of originating summons but was commenced by originating motion — Whether there was distinction between a nullity and an irregularity — Whether this had caused prejudice or injustice — Whether originating motion should be treated as originating summons — Rules of the High Court 1980 O 2*

Civil Procedure *— Pleadings — Amendment of — Oral application to amend originating summons to enable court to give the required consent — No prejudice or injury would be caused by the amendment — Whether amendment should be allowed — Rules of the High Court 1980 O 20 r 8*

Family Law *— Marriage — Capacity — Under 21 years old — Consent to marry — Impracticable to obtain father's consent — Father was not dead but could not be found — Proper person to give consent — Whether mother could give consent — Proper procedure to be followed — Whether fit and proper case for court to exercise its discretion to give consent — Law Reform (Marriage and Divorce) Act 1976 s 12*

The applicant ('CHS') and her husband ('the husband') were the natural parents of one FHL who was born on 1 January 1979. The husband left the matrimonial home since 1982 and could not be found. On 3 September 1995, FHL married one LEW in accordance with Chinese customary rights with the blessings of both the applicant and LEW's parents. At the time of the application, FHL was already six months pregnant and desired that her marriage with LEW be registered pursuant to the Law Reform (Marriage and Divorce) Act 1976 ('the Act'). As she was under 21 years of age, the consent of the father must first be obtained before the marriage could be duly registered. The applicant prayed by way of an originating motion that the consent of the husband be dispensed with and that the applicant be allowed to give the necessary consent. The court had to consider whether: (i) the proper procedure had been followed; and (ii) its discretion to grant consent ought to be exercised in this particular case.

Held, allowing the application:

(1) On the facts of this case, the person who could lawfully give the consent was the father as provided by sub-s (1)(a) of the s 12 of the Act or, if he was dead, the mother as provided by sub-s (1)(b) of s 12. Thus, the legal right of the mother to give her consent arose only when the father was dead and not on any other ground. As the father in this case was not dead, the applicant was not the proper person to give the consent. This interpretation flowed from the plain meaning of the words employed in the section and it was the function of the court to give effect to the statute according to its natural and ordinary meaning (see p 158A–C).

(2) As it was impracticable to obtain the consent of the father as he was not available, the proper procedure was for the applicant to apply for an order to enable the court to give the required consent (see p 159A–C).

(3) The proceedings ought to be by way of an originating summons and not an originating motion as was done in this case. However, whether this amounted to an irregularity or nullity was not important as O 2 of the Rules of the High Court 1980 ('the RHC') had done away with this distinction. Every omission or mistake in practice or procedure is thus to be regarded as an irregularity which the court could and should rectify so long as it could do so without injustice.

In this case, since nobody was prejudiced and based on the justice of the case and the urgency of the matter, bearing in mind the fact that FHL was already six months pregnant, the originating motion therefore could be treated as an originating summons (see p 159E–H); *Harkness v Bell's Asbestos and Engineering Ltd* [1966] 3 All ER 843 followed.

(4) Under O 20 r 8 of the RHC, all amendments would be allowed at any stage of the proceedings and of any documents in the proceedings (other than a judgment or order) on such terms as to costs or otherwise as the court thinks fit. An amendment would be refused if it resulted in prejudice or injury which could not be properly compensated for by costs.

As the documents in this application did not require service on any other person thereby not resulting in prejudice to anyone — and bearing in mind the urgent nature of the application and the fact that the amendment sought could have been conveniently inserted in the originating summons — the oral application to amend the prayer to enable the court to give the required consent was allowed (see pp 162I–163C).

(5) This case concerned a couple already married under Chinese customary rights and the customary marriage was conducted with the consent of all parents except FHL's father for the reasons as stated in the application. The couple had cohabited as husband and wife and FHL was already six months pregnant. The order was sought by the applicant and the couple who wished to formalize their marriage. In the circumstances, it was a fit and proper case wherein the court should exercise its discretion to give the consent as it was impracticable to obtain the consent of the father (see p 164A–C); *Glass v Glass* (1960) 32 WWR 321; *Re Baynes* [1961] 36 WWR 239 and *Re K (an infant)* [1964] ALR 363 distinguished.

[Bahasa Malaysia summary

Pemohon ('CHS') dan suaminya adalah ibu bapa sebenar seorang bernama FHL yang dilahirkan pada 1 January 1979. Suaminya telah meninggalkan rumah perkahwinan sejak tahun 1982 dan tidak dapat dijumpai. Pada 3 September 1995, FHL telah berkahwin dengan

seorang bernama LEW menurut adat-istiadat kaum Cina dan direstui oleh kedua-dua pemohon dan ibubapa LEW. Semasa permohonan dibuat, FHL sudah enam bulan mengandung dan ingin supaya perkahwinannya dengan LEW didaftarkan menurut Akta (Perkahwinan dan Penceraian) Pembaharuan Undang-undang 1976 ('Akta tersebut'). Oleh kerana umurnya adalah bawah 21 tahun, persetujuan bapanya harus diperolehi dahulu sebelum perkahwinan didaftarkan dengan wajarnya. Pemohon telah memohon melalui usul pemula bahawa persetujuan suaminya dapat dikecualikan dan bahawa pemohon dibenarkan memberikan persetujuan yang diperlukan itu. Mahkamah terpaksa mempertimbangkan sama ada: (i) prosedur yang wajar telah diikut; dan (ii) budi bicara untuk memberikan persetujuan harus dilaksanakan dalam kes ini.

Diputuskan, membenarkan permohonan ini:

(1) Berdasarkan fakta-fakta kes ini, orang yang boleh memberikan persetujuan yang sah adalah bapa seperti yang diperuntukkan oleh sub-s (1)(a) s 12 Akta tersebut, ataupun, jikalau ianya telah meninggal dunia, ibunya seperti yang diperuntukkan oleh sub-s (1)(b) s 12. Oleh yang demikian, hak undang-undang ibu untuk memberikan persetujuan hanya timbul jikalau bapanya telah meninggal dunia dan bukannya atas alasan lain. Berdasarkan fakta-fakta kes ini, oleh kerana bapanya tidak meninggal dunia, maka pemohon bukanlah orang yang sepatutnya memberikan persetujuan. Tafsiran ini didapati daripada maksud biasa perkataan-perkataan yang digunakan dalam seksyen dan adalah fungsi mahkamah untuk memberikan kesan kepada statut menurut maksud yang biasa dan sebenar (lihat ms 158A–C).

(2) Oleh kerana ianya adalah tidak praktik untuk memperolehi persetujuan bapa kerana ianya tidak ada, prosedur yang wajar adalah supaya pemohon memohon untuk suatu perintah untuk membolehkan mahkamah memberikan persetujuan yang diperlukan itu (lihat ms 159A–C).

(3) Prosiding tersebut sepatutnya dijalankan melalui saman pemula dan bukannya usul pemula seperti yang dilakukan dalam kes ini. Walau bagaimanapun sama ada ini merupakan suatu luar aturan ataupun pembatalan adalah tidak penting kerana A 2 Kaedah-Keaedah Mahkamah Tinggi 1980 ('KMT') telah menghapuskan perbezaan ini. Setiap peninggalan ataupun kesilapan dalam amalan ataupun prosedur haruslah dianggap sebagai luar aturan yang mana mahkamah boleh dan harus membetulkan asalkan ianya boleh berbuat begitu tanpa ketidakadilan.

Dalam kes ini, kerana tiada siapa yang telah dimudaratkan dan berdasarkan keadilan kes ini dan kesegeraan perkara tersebut, memandangkan juga fakta bahawa FHL sekarang sudah mengandung enam bulan, maka usul pemula itu boleh dianggap sebagai saman pemula (lihat ms 159E–H); *Harkness v Bell's Asbestos and Engineering Ltd* [1966] 3 All ER 843 diikut.

(4) Berdasarkan A 20 k 8 KMT, semua pindaan akan dibenarkan pada pada mana-mana tahap prosiding dan ke atas mana-mana dokumen prosiding (kecuali sesuatu penghakiman dan perintah) atas terma-terma berkenaan dengan kos ataupun sebaliknya seperti yang dianggap wajar oleh mahkamah. Suatu pindaan tidak akan dibenarkan jikalau iannya mengakibatkan kemudaratan ataupun kerugian yang tidak dapat dipampaskan dengan kos.

Oleh kerana dokumen dalam permohonan tidak memerlukan penyerahan ke atas mana-mana orang, maka tiada siapa akan dimudaratkan — memandangkan sifat segera permohonan dan fakta bahawa pindaan yang dipohon dapat dimasukkan dengan mudahnya dalam saman pemula — maka permohonan lisan untuk meminda permohonan untuk membolehkan mahkmah memberikan persetujuan yang perlu itu dibenarkan (lihat ms 162I–163C).

(5) Kes ini adalah berkenaan pasangan yang telahpun berkahwin menurut adat-istiadat kaum Cina dan perkahwinan adat-istiadat tersebut telah dijalankan dengan persetujuan kesemua ibubapa kecuali bapa FHL untuk sebab-sebab yang dinyatakan dalam permohonan itu. Pasangan tersebut telahpun bersekedudukan sebagai suami isteri dan FHL telahpun enam bulan mengandung. Perintah tersebut dipohon oleh pemohon dan pasangan tersebut yang ingin menjadikan perkahwinan mereka formal. Dalam keadaan berikut, ianya adalah suatu kes yang wajar dan sesuai di mana mahkamah harus melaksanakan budi bicaranya untuk memberikan persetujuan oleh kerana ianya adalah tidak praktik untuk memperolehi persetujuan dari bapa (lihat ms 164A–C); *Glass v Glass* (1960) 32 WWR 321; *Re Baynes* [1961] 36 WWR 239 dan *Re K (an infant)* [1964] ALR 363 dibeza.]

Notes

For cases on the mode of commencement, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2292–2317.

For cases on amendment of pleading, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2511–2526.

For cases on the capacity to marry, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 2074–2080.

Cases referred to

Baynes, Re [1961] 36 WWR 239 (distd)

Chiu Wing Wah & Ors v Ong Beng Cheng [1994] 1 MLJ 89 (refd)

Glass v Glass (1960) 32 WWR 321 (distd)

Harkness v Bell's Asbestos and Engineering Ltd [1966] 3 All ER 843 (follD)

Ho Yoke Kwei & Anor v Ong Eng Hing [1997] 4 MLJ 292 (refd)

Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano [1997] 1 MLJ 94 (refd)

K (an infant), Re [1964] ALR 363 (distd)

Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd [1991] 2 MLJ 129 (refd)

Lee Phet Boon v Hock Thai Finance Corp Bhd [1994] 2 MLJ 448 (refd) A
Loo Choy Meng v Ong Cheong Hoe (Gamuda Sdn Bhd, garnishee) [1990] 1 MLJ 445 (refd)
Metroinvest Anstalt & Ors v Commercial Union Assurance Co plc [1985] 2 All ER 318 (refd)
Mohd bin Ismail v Tan Sri Hj Osman Saat & Ors [1982] 2 MLJ 133 (refd) B
PP v Mohd Ali bin Jaafar [1997] 4 MLJ 221 (refd)
Pacific Centre Sdn Bhd v United Engineers (M) Bhd [1984] 2 MLJ 143 (refd)
Shanmugam v Pappah [1994] 1 MLJ 144 (refd)
Wong Yoon Chai v Lee Ah Chin [1981] MLJ 219 (refd) C

Legislation referred to

Law Reform (Marriage & Divorce) Act 1976 s 12
Specific Relief Act 1950 ss 41, 42
Rules of the High Court 1980 O 2, O 5, O 8 r 3, O 20 rr 5 & 8, O 28 r 1, O 53, O 92 r 4 D
Subordinate Court Rules 1980 O 2

Fatima bte Tahir Ali (*SF Pang & Chandra*) for the applicant.

Augustine Paul JC: The issue for determination in this application was E who could lawfully consent to the marriage of a person who had not completed his or her twenty-first year when the father of such person could not be found.

CHS, the applicant, and her husband, FCH, are the natural parents of one FHL, a female, who was born on 1 January 1979. FCH left the F matrimonial home in 1982 and could not be found. On 3 September 1995, FHL married one LEW in accordance with Chinese customary rites with the blessings of her mother, the applicant. A dinner was held at the Pay Teck School Hall, Jalan Portugis on 3 September 1995 to celebrate the marriage. The dinner was hosted by the parents of LEW. FHL is now G expecting her first child and is desirous of having her marriage with LEW registered pursuant to the provisions of the Law Reform (Marriage and Divorce) Act 1976 ('the Act'). However, she is confronted with a problem. As she is under the age of 21 years, the consent of her father is required before she can have her marriage duly registered under the Act. She was H unable to get such consent as her father could not be found. By this originating motion, her mother, the applicant, prayed for an order that the requirement of the consent of FCH be dispensed with as it was impracticable to obtain his consent and that she be allowed to give the necessary consent. The applicant filed a certificate of urgency to have the motion heard on an urgent basis. The grounds advanced for an expedited hearing were that I FHL is now six months pregnant and the couple wished to have the marriage registered in order to ensure the legitimacy and inheritance rights of the child.

A The requirement of consent where one of the parties is under the age of 21 years depicts legislative wisdom. As *Bromley's Family Law* (8th Ed) states at p 43, the purpose of obtaining such consent is:

> ... to prevent minors contracting unwise marriages. Doubtless in 1753, parliament was primarily concerned to see that property did not get into the
B hands of undesirable suitors; today its object is to cut down the number of potentially unstable unions.

The requirement of consent for the marriage of a person under the age of 21 years is governed by s 12 of the Act ('the section'). The section reads as follows:

C (1) A person who has not completed his or her twenty-first year shall, notwithstanding that he or she shall have attained the age of majority as prescribed by the Age of Majority Act 1971, nevertheless be required, before marrying, to obtain the consent in writing:

(a) of his or her father; or

D (b) if the person is illegitimate or his or her father is dead, of his or her mother; or

(c) if the person is an adopted child, of his or her adopted father, or if the adopted father is dead, of his or her adopted mother; or

(d) if both his or her parenst (natural or adopted) are dead, of the person standing in *loco parentis* to him or her before he or she attains
E that age;

but in any other case no consent shall be required.

(2) Where the court is satisfied that the consent of any person to a proposed marriage is being withheld unreasonably or all those persons who could give consent under sub-s (1) are dead or that it is impracticable to
F obtain such consent, the court may, on application, give consent and such consent shall have the same effect as if it had been given by the person whose consent was required by sub-s (1).

(3) An application to the High Court under this section shall be made to a judge in chambers.

G (4) When an application is made to the High Court in consequence of a refusal to give consent, notice of the application shall be served upon the person who refused to give consent.

(5) Notwithstanding anything to the contrary in this part, consent to the marriage of a minor shall not be necessary if the minor has been previously married.

H (6) There shall be no appeal from an order of a judge under this section.

When the motion was called up for hearing in open court, I asked learned counsel whether the application was in accordance with the requirements of the section. She submitted that as it was impracticable to obtain the consent of the father, the proper person to give the consent was the mother
I as she was available. She added that sub-s (2) of the section which deals with the power of the court to give the required consent was activated only when all the persons listed in sub-s (1) of the section were incapable of giving such consent. I intimated to her that I was unable to accept the views advanced.

It is my view, as I explained to learned counsel, that on the facts of this case, the person who could lawfully give the consent was the father as provided by sub-s (1)(a) of the section or, if he was dead, the mother as provided by sub-s (1)(b) of the section. Thus, the legal right of the mother to give consent arises only when the father is dead and not on any other ground. The corollary is that the applicant was not the proper person to give consent on the facts of this case as the father was not dead. This interpretation flows from the plain meaning of the words employed in the section and it is the function of the court to give effect to the statute according to its natural and ordinary meaning. In this regard, I refer to *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano* [1997] 1 MLJ 94 where Gopal Sri Ram JCA in writing for the Federal Court said at pp 100I–101C:

> The function of a court when construing an Act of Parliament is to interpret the statute in order to ascertain legislative intent primarily by reference to the words appearing in the particular enactment. Prima facie, every word appearing in an Act must bear some meaning. For parliament does not legislate in vain by the use of meaningless words and phrases. A judicial interpreter is therefore not entitled to disregard words used in a statute or subsidiary legislation or to treat them as superfluous or insignificant. It must be borne in mind that:
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> > 'As a general rule a court will adopt that construction of a statute which will give some effect to all the words which it contains: per Gibbs J in *Beckwith v R* (1976) 12 ALR 333 at p 337.'
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> See also *Commonwealth v Baume* (1905) 2 CLR 405, at p 414, per Griffith CJ. Where it is impossible to give a full and accurate meaning to every word appearing in a section of a statute, the duty of the court is to give the words an interpretation, 'that produces the greatest harmony and the least inconsistency': *Australian Alliance Assurance Co Ltd v A-G (Queensland)* (1916) St R Qd 135 at p 161, per Cooper CJ.

As I had said in *PP v Mohd Ali bin Jaafar* [1997] 4 MLJ 221 at p 229:

> Thus the fundamental rule of interpretation of a statute is to ascertain the intention of parliament. If the words of a statute are in themselves precise and unambiguous, the court must give effect to them according to their natural and ordinary meaning, as the words themselves best declare the intention of parliament. If, however, adhering to their grammatical and ordinary meaning would lead to some absurdity or some repugnancy or inconsistency with the other parts of the statute, the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency, but no further (see *Trustees of the Kheng Chiu Tin Hon Kong and Burial Ground v Collector of Land Revenue* [1992] 1 SLR 425).

The plain meaning given to sub-s (1) of the section will not produce any absurdity in view of the remedy provided by sub-s (2) of the section. It caters for anomalous situations as in the case at bar and authorizes the court to give consent where:

(a) it is satisfied that the consent of any person is being withheld unreasonably; or

(b) all those persons who could give consent under sub-s (1) are dead; or

(c) it is impracticable to obtain such consent.

The word 'impracticable' is defined in the *Concise Oxford Dictionary* (9th Ed) as 'impossible in practice'. *Black's Law Dictionary* (6th Ed) states that although impossibility or impracticability of performance may arise in many different ways, the tendency has been to classify the cases into several categories, inter alia:

> Destruction, deterioration or unavailability of the subject matter or the tangible means of performance.

On the facts of this case, it was impracticable to obtain the consent of the father as he was not available. Accordingly, the proper procedure to be followed was for the applicant to apply for an order to enable the court to give the required consent.

Learned counsel in a swift and skilful manoeuvre then orally applied for:

(a) the originating motion to be treated as an originating summons as sub-s (3) of the section requires an application under the section to be made to a judge in chambers; and

(b) the prayers to be amended to enable the court to give the required consent under sub-s (2) of the section.

Application to treat the originating motion as an originating summons

As the section requires any application under it to be made in chambers, the proceedings ought to be by way of an originating summons and not an originating motion as was done in this case. The first application of learned counsel therefore required a consideration of whether a wrong mode of commencement of proceedings rendered it a nullity thereby precluding a treatment of the originating motion as an originating summons. The different modes of commencing proceedings in the High Court are governed by O 5 of the Rules of the High Court 1980 ('the RHC'). If in the case of a cause or matter begun by originating summons, it appears to the court at any stage of the proceedings that it should be continued as if the cause or matter had been begun by writ, then O 28 r 8(1) of the RHC expressly authorizes the court to order the proceedings to continue as if the cause or matter had been so begun. No specific provision has been made in the RHC with regard to the other modes of commencing proceedings. This does not, in my opinion, mean that there is no power to correct the mode of commencing proceedings in the other cases. The rationale behind having a special provision to treat an originating summons as a writ is obvious, that is to say, it enables affidavits used in the originating summons to stand as pleadings which are required for a writ. Without explicit authorization in the rules, it would not be possible to achieve such a result. In other cases, however, a party in default may seek refuge under O 2 and O 92(4) of the RHC. They read as follows:

> 2 (1) Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of anything done or left undone, been a failure

to comply with the requirements of these rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any step taken in the proceedings, or any document, judgment or order therein.

(2) Subject to para (3), the court may, on the ground that there has been such a failure as is mentioned in para (1), and on such terms as to costs or otherwise as it thinks just, set aside either wholly or in part the proceedings in which the failure occurred, any step taken in those proceedings or any document, judgment or order therein or exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceedings generally as it thinks fit.

(3) The court shall not wholly set aside any proceedings or the writ or other originating process by which they were begun on the ground that the proceedings were required by any of these rules to be begun by an originating process other than the one employed.

92(4) For the removal of doubts it is hereby declared that nothing in these rules shall be deemed to limit or affect the inherent powers of the court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

I had occasion to deal at some length with the equivalent of O 2 of the RHC in the Subordinate Courts Rules 1980 in *Ho Yoke Kwei & Anor v Ong Eng Hing* [1997] 4 MLJ 292. Order 2 of the RHC does away with the old distinction between a nullity and an irregularity. Every omission or mistake in practice or procedure is thus to be regarded as an irregularity which the court can and should rectify so long as it can do so without injustice (see *Harkness v Bell's Asbestos and Engineering Ltd* [1966] 3 All ER 843). On the manner of exercising the discretion to rectify an irregularity, Cumming-Bruce LJ said in *Metroinvest Anstalt & Ors v Commercial Union Assurance Co plc* [1985] 2 All ER 318 at p 324:

> I would say that in most cases the way in which the court exercises its power under O 2 r 1(2) is likely to depend on whether it appears that the opposite party has suffered prejudice as a direct consequence of the particular irregularity, that is to say the particular failure to comply with the rules. But I would construe O 2 r 1(2) as being so framed as to give the court the widest possible power in order to do justice.

It must be observed that O 2 r 1 of the RHC applies, inter alia, to the 'form' of beginning proceedings while r 3 expressly provides that the court shall not wholly set aside any proceeding on the ground that the proceedings were required by any of the rules to be begun by an originating process other than the one employed. The inherent jurisdiction of the court under O 92 r 4 of the RHC can be exercised in a situation where a lacuna exists in the RHC and where the same causes a procedural injustice in that it does not provide an adequate remedy or remedies and the court is then not only entitled to fill the gap, but is obliged to do so, in order to avoid an injustice (see *Loo Choy Meng v Ong Cheong Hoe (Gamuda Sdn Bhd, garnishee)* [1990] 1 MLJ 445). In *Pacific Centre Sdn Bhd v United Engineers (M) Bhd* [1984] 2 MLJ 143, Edgar Joseph Jr J (as he then was) said at p 147 that:

> ... it is clear that the inherent jurisdiction of the court includes all the powers that are necessary to fulfil itself as a court of law, to uphold, to protect, and to fulfil the judicial functions of administering justice according to law in a regular, orderly and effective manner.

The courts have, on numerous occasions, been confronted with procedural irregularities in commencing proceedings and have shown willingness to regularize the defect if satisfied that it does not prejudice the opposite party and that it is in the interests of justice to do so. In *Wong Yoon Chai v Lee Ah Chin* [1981] 1 MLJ 219 where the application was made by way of a summons-in-chambers when it should have been commenced by originating summons, the Federal Court held that it was an irregularity which was curable. In *Shanmugam v Pappah* [1994] 1 MLJ 144, Edgar Joseph Jr SCJ, while sitting in the High Court, said that the failure to comply with the requirements of any rules in beginning proceedings should be treated as a mere irregularity which does not nullify the proceedings. In *Chiu Wing Wah & Ors v Ong Beng Cheng* [1994] 1 MLJ 89, the Supreme Court did not find fault with the High Court's treatment of an originating summons as one made under O 89 of the RHC. In *Kuah Kok Kim v Chong Lee Leong Seng Co (Pte) Ltd* [1991] 2 MLJ 129, the petition bore the heading or title of a companies winding-up petition when it should have been that of an originating petition. The Singapore Court of Appeal held that the defect was an irregularity which was curable. In *Mohd bin Ismail v Tan Sri Hj Osman Saat & Ors* [1982] 2 MLJ 133, an objection was taken to the effect that the action should be dismissed as it was commenced by motion instead of by writ. In answer to this, Wan Yahya J (as he then was) said at p 134:

> On the question of procedure, it was submitted that this action should have been by a writ and not by a motion and that on the authorities of *Hj Ismail bin Che Chik v State Commissioner, Penang* [1975] 1 MLJ 271 and *Sungai Wangi Estate v Uni* [1975] 1 MLJ 136, the court should dismiss the application. In my opinion, both these cases are not proper propositions for dismissing a suit for irregular procedure. Although in both these cases, the court commented that the mode adopted by the applicants was inappropriate, it nevertheless went on to consider and determine each case on its merits. To my mind, the procedure adopted by the applicant merely rendered the proceedings irregular but by no means void. In such a case, the court may, if it is satisfied that the parties, their counsel and the court will not be seriously embarrassed by the irregularity and that such irregularity will not lead to injustice to any party, proceed to hear and determine the case. This point was discussed at p 272 of *Hj Ismail*'s case wherein Chang Min Tat J (as he then was) said at p 272:
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> > 'All in all, it does appear to me that there is considerable substance in the contention of the learned legal advisor. On the other hand, however, there cannot be any serious embarrassment to the parties or their counsel in presenting their contentions or to the court in hearing the case and coming to a decision. No disputes of facts arise and the matter stands to be decided on a consideration whether there are powers to make the subsidiary legislation providing for an increased rental in the case of land hitherto held under a statutory land grant. For myself, if, in a summons for directions, any application was made in an action commenced by writ for similar reliefs for an order to try the action as

on a motion, I would not have expected objection from the respondent and I would not myself have hesitated to make the order.' A

On the question of procedure, an objection was further raised by the first respondent on the failure of the applicant to intitule his motion. It was submitted that this amounted to non-compliance with the form prescribed under O 8 r 3 and that in turn it had left the respondent in the dark as to the legal nature of the relief claimed, ie whether it is under ss 41 or 42 of the Specific Relief Act 1950 or under O 53 of the RHC, or under judicial review. The answer to this, as provided at the hearing itself, is that the applicant is proceeding under s 41 of the Specific Relief Act 1950 as an adjunct to prerogative remedies. B

The question for my immediate consideration however is whether the respondents were truly embarrassed, or in any way prejudiced by this slight omission. My view is that they were not. If by any chance they were, they could have taken out summons for directions or they could have, after hearing the applicant's case, asked for an adjournment to prepare the reply. The respondents did neither of these but merely chose to raise this only at the hearing. The eloquence and thoroughness with which Mr CKG Pillay, counsel for the first respondent, addressed the court and the contents of his written submission indicate anything but lack of preparedness and appreciation of the claim they were faced with. C D

I am of the view that this is a proper case to invoke the powers and exercise my discretion under O 2 and O 92 r 4 of the RHC and to rule the motion to proceed and be considered on its merits. Moreover the applicant had an arguable issue to be tried (see *Merricks & Anor v Nott Bower & Anor* [1964] 1 All ER 717). E

Finally I refer to *Lee Phet Boon v Hock Thai Finance Corp Bhd* [1994] 2 MLJ 448 where Abdul Kadir Sulaiman J held that the commencement of the proceeding in that case by the wrong mode was sufficient to dismiss it. In my view, his Lordship was compelled to take such a stand as a reading of the judgment does not disclose any application being made to cure the irregularity. In the circumstances, the irregularity remained as one and the order made by the learned judge cannot be assailed. F

On the facts of this case, I was satisfied that nobody will be prejudiced as a result of me allowing the application as it has been made ex parte. The justice of the case and the urgency of the matter, bearing in mind the fact the FHL is now six months pregnant, warranted a favourable consideration of the application. Accordingly, I ordered that the originating motion be treated as an originating summons. G

Application to amend the prayer H

The prayer in the summons required to be amended to enable the court to give the required consent. An originating process may be amended at any stage of the proceedings as authorized by O 20 r 5 read with r 7 of the RHC. The overriding principle with regard to amendments is that contained in O 20 r 8 which provides that, generally speaking all amendments will be allowed at any stage of the proceedings and of any document in the proceedings (other than a judgment or order) on such terms as to costs or otherwise as the court thinks just. An amendment would be refused if it I

A would result in prejudice or injury which cannot be properly compensated for by costs. As the *Supreme Court Practice* (1967) states at p 291:

> Accordingly, as a general rule, either party is allowed to make any amendment in his pleadings or other proceedings which is reasonably necessary for the due presentation of his case on payment of the costs of and occasioned by
B the amendment, provided there has been no undue delay on his part, and provided also the amendment will not injure or prejudicially affect any vested rights of his opponent.

As the documents in this application did not require service on any other person thereby not resulting in prejudice to anyone and bearing in mind
C the urgent nature of the application and the fact that the amendment sought can be conveniently inserted in the original summons, I allowed the oral applications to amend the prayer to enable the court to give the required consent.

Exercise of discretion under the section

D Subsection (2) of the section gives the court discretion to give or withhold the required consent. It is settled law that discretion must be exercised judicially. Where the required consent was being withheld by the person lawfully authorized to give the consent and the court was required to give the consent, the burden on the applicant is heavy. In *Glass v Glass* (1960)
E 32 WWR 321 where the parents had withheld consent, it was held that such consent should not be given by the court lightly. It was also held that it was insufficient for the applicant to merely allege 'love' and pregnancy. The applicant must establish an understanding and appreciation of what marriage means and demands, and the means and capacity to bear the consequent economic and social responsibilities, and avoidance by marriage
F of the social stigma attendant on the pregnancy. It was further held that the court has no right to presume that the refusal of the order will cause the applicant to continue his unconventional and immoral conduct. In *Re Baynes* (1961) 36 WWR 239, the infant applicant applied for an order to dispense with the consent of his parents to his marriage with a girl who was
G pregnant by him. The application was refused on the ground that the power to make such an order exists only if the parents had unreasonably refused or withheld their consent. It was further held that it was not unreasonable to refuse consent where the applicant was a schoolboy whose employment record was untested. In *Re K (infant)* (1964) ALR 363, it was held that the fact that an applicant was pregnant would not, of itself, justify
H the making of an order in favour of the applicant. The court also observed that the justification for making an order is a question to be determined on the facts of each particular case. In my opinion, the fact that the girl involved is pregnant is a matter that requires serious consideration in the context of Malaysian moral values. In this regard I hesitate to follow Western guidelines where the concept of unwed mothers is an accepted
I norm of life.

I must stress that this application is not concerned with a situation where consent has been refused by the father of a minor. Thus the burden on the applicant is not as heavy as in the cases I have referred to. This case

concerns a couple already married under Chinese customary rites. It was conducted with the blessings of the applicant. The wedding dinner was hosted by the parents of LEW. Thus the customary marriage was conducted with the consent of all the parents except FHL's father for the reason stated in the application. The couple has cohabited as husband and wife since 3 September 1995. FHL is now six months pregnant. The order is sought by the applicant and the couple who wish to formalize their marriage. In the circumstances, I was of the view that this is a fit and proper case where the court should exercise its discretion to give the consent as it is impracticable to obtain the consent of the father. Accordingly, I gave the consent prayed for. The order was made in chambers as required by the section.

Application allowed.

Reported by Lew Chee Seong